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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALEJANDRO PICHARDO, Plaintiff and Respondent, v. AMERICAN FINANCIAL NETWORK, Defendant and Appellant.	G054755 (Super. Ct. No. 30-2016-00880472) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thierry Patrick Colaw, Judge. Reversed and remanded.

Law Office of Brett C. LaCues, Brett Christian LaCues; Fisher & Phillips, Wendy McGuire Coats and Annie Lau for Defendant and Appellant.

Justice Law Corporation, Douglas Han, Shunt Tatavos-Gharajeh, Daniel J. Park and Arsine Grigoryan for Plaintiff and Respondent.

* * *

Alejandro Pichardo is the named plaintiff in a putative class action against his former employer, defendant American Financial Network, Inc., for alleged wage and hour violations. Defendant moved to compel individual arbitration and stay the trial court proceedings. The court denied the motion because it determined, among other things, that (1) the arbitration agreement was both procedurally and substantively unconscionable, and (2) the unconscionable provisions permeated the agreement, making severance of those provisions inappropriate. We agree that the arbitration agreement bears indicia of procedural unconscionability and that the stand-alone rules referenced in the arbitration agreement contain provisions that are substantively unconscionable. However, we conclude that those stand-alone rules were not incorporated by reference into the arbitration agreement, and that any substantive unconscionability in the arbitration agreement can be eliminated by striking the agreement's single reference to those stand-alone rules. Absent the 12 words in that single reference, the balance of the arbitration agreement is fully compliant with the minimum requirements required in a mandatory employment arbitration agreement under *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 91 (*Armendariz*). In view of California's "'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution'" (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9), the court's refusal to sever that single 12-word sentence from the agreement was an abuse of discretion. We therefore reverse and remand.

FACTS

Defendant is a retail mortgage lender with offices in 28 states. It makes loans to consumers and then sells the loans on the secondary market to investors. Defendant employs "Post Closers," who facilitate the sale of loans to investors.

In August 2015, plaintiff (a high school graduate with three years of college coursework, who at the time was unemployed) received an offer to work for defendant as a Post Closer. On his start date, he reported to defendant's hiring manager, who gave him a stack of about 20 onboarding documents that he was instructed to fill out before he could begin work. According to defendant, one of the documents that plaintiff signed was a four-page document entitled "MUTUAL AGREEMENT TO ARBITRATE EMPLOYMENT-RELATED DISPUTES" (the Arbitration Agreement). Although plaintiff does not recall signing the Arbitration Agreement, he does not deny that the "wet ink" signature on the document is his or otherwise assert that the signature was forged.

The Arbitration Agreement provides, among other things, that all claims arising out of plaintiff's employment (subject to a few enumerated exceptions) are subject to binding arbitration administered by JAMS in accordance with the JAMS employment arbitration rules & procedures; that in any such arbitration the parties are "entitled to conduct discovery to the full extent authorized by the California Code of Civil Procedure"; that the arbitrator must issue "a written decision explaining his or finding and conclusions"; that the arbitrator must "apply the substantive state or federal law (and the law of remedies, if applicable) as applicable to the claim(s) asserted"; that defendant must pay for the arbitrator's fees and expenses; and that plaintiff waives the right to bring a class action.

With regard to selecting an arbitrator, section 8 of the Arbitration Agreement provides: "The Arbitrator shall be selected as provide[d] in [defendant's] Rules and Procedures." Importantly, section 8 is the *only* section of the Arbitration Agreement that mentions the "Rules and Procedures." This appears to be a reference to a one-page standalone document entitled "ARBITRATION-RULES AND PROCEDURES." This document was not attached to the Arbitration Agreement, and there is no evidence that it was ever provided or made available to plaintiff during his

employment. Defendant later produced the document to plaintiff's counsel in response to a request for records under Labor Code sections 226, 432, and 1198.5.

After one year of employment with defendant, plaintiff quit his job. A few months later, he was substituted in as the named plaintiff in a pending putative class action against defendant for alleged wage and hour violations.[1]

Defendant moved to stay the trial court proceedings and compel arbitration. In its memorandum of points and authorities, defendant asked the court to issue a statement of decision "under Section 1291 of the Code of Civil Procedure" if the motion is denied. In support of its motion to compel, defendant provided a declaration by Andrew Kalyviaris, defendant's chief compliance officer and associate general counsel, attached to which was the subject Arbitration Agreement. Kalyviaris did not claim to have been present when plaintiff signed the Arbitration Agreement or otherwise attempt to authenticate the Arbitration Agreement.

Plaintiff opposed the motion. In support of his opposition, plaintiff provided his own declaration, a declaration by the former named plaintiff, and a declaration by plaintiff's attorney, attached to which was the Rules and Procedures document that defendant had produced in response to the records request.

The court heard oral argument and took the matter under submission. Four days later, it issued a three-page minute order denying defendant's motion for the following reasons: (1) defendant failed to authenticate plaintiff's signature on the Arbitration Agreement; (2) the class action waiver provision violates the National Labor Relations Act (29 U.S.C. § 151 et seq.; NLRA); (3) the Arbitration Agreement was

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[1] The original named plaintiff, Anabelle Little, was replaced by plaintiff Pichardo in the operative first amended complaint, apparently because plaintiff Little's claims had already been adjudicated by the Labor Commissioner. In accordance with the trial court's February 14, 2017 order, we have updated the caption in this matter to include plaintiff Pichardo's name in place of Little's.

procedurally and substantively unconscionable; and (4) severance was not possible because the Arbitration Agreement was "permeated with . . . one-sided, overly harsh and unfair provisions."[2] Two days later, plaintiff served a notice of entry of judgment. Defendant appealed.

DISCUSSION

On appeal, defendant challenges: (1) the court failure's to provide a statement of decision in accordance with Code of Civil Procedure section 632; (2) the court's finding that defendant failed to authenticate the Arbitration Agreement; (3) the court's finding that the Arbitration Agreement's class action waiver violates the NLRA; (4) the court's finding that the Arbitration Agreement is procedurally and substantively unconscionable and thus unenforceable; and (5) the court's refusal to sever the offending provisions. We address each issue in turn.

The Court's Failure to Issue a Statement of Decision

Defendant first asserts that the court's failure to provide a statement of decision in accordance with Code of Civil Procedure section 632 was reversible error. We disagree. Code of Civil Procedure section 632 provides that "written findings of fact and conclusions of law" are not required following a court trial, but that upon a timely request by any party, "[t]he court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial . . . ." (Code Civ. Proc., § 632.) Although a motion to compel arbitration is not a court trial in the traditional sense, California's statutes on contractual arbitration require a

[2] The trial court also held that the Federal Arbitration Act applies. (9 U.S.C. § 1 et seq.) Defendant does not challenge this part of the ruling.

court to issue a statement of decision for any ruling denying a motion to compel arbitration if such a statement of decision is properly and timely requested. (Code Civ. Proc., § 1291; *Metis Development LLC v. Bohacek* (2011) 200 Cal.App.4th 679, 687.) No statement of decision is required if the parties fail to request one. (Code Civ. Proc., § 632.)

Importantly, a party's request for a statement of decision "*shall specify those controverted issues* as to which the party is requesting a statement of decision." (Code Civ. Proc., § 632, italics added; see *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1115 [statement of decision must address "only the '"controverted issues"' a party 'specif[ies]' in the request"]; Cal. Rules of Court, rule 3.1590(d) ["The principal controverted issues must be specified in the request"].) Here, defendant made a vague, one-sentence request for a statement of decision in the concluding lines of its motion to compel: "Should this motion be denied, [defendant] requests that the Court issue a Statement of Decision under Section 1291 of the Code of Civil Procedure." This brief request did not satisfy section 632's specificity requirement, as it did not identify any controverted issues. (*City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1292-1293 ["a general, nonspecific request for a statement of decision does not operate to compel a statement of decision as to all material, controverted issues"]; see *Conservatorship of Hume* (2006) 140 Cal.App.4th 1385, 1394 ["A party is not entitled to a statement of decision based on a 'general inquisition' that 'unfairly burdens the trial judge in that he must not only speculate which questions embrace ultimate as distinguished from evidentiary facts, but also search his recollection of the record without the assistance of a suggestion from counsel'"].) Having failed properly to request a statement of decision, defendant cannot complain on appeal about the trial court's failure to issue one.

The Authentication Issue

Defendant attacks the court's conclusion that "defendant failed to authenticate [plaintiff's] signature on the subject agreement." We agree this portion of the court's ruling was erroneous. Defendant was not required to authenticate plaintiff's signature because plaintiff did not challenge the authenticity of his signature. (*Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 218-219; see *Ruiz v. Moss Bros. Auto Group, Inc*. (2014) 232 Cal.App.4th 836, 846 ["Properly understood, *Condee* holds that a petitioner is not required to authenticate an opposing party's signature on an arbitration agreement *as a preliminary matter* in moving for arbitration *or* in the event the authenticity of the signature is not challenged"].) Although plaintiff cannot recall signing the Arbitration Agreement, he does not deny that the "wet ink" signature on the Arbitration Agreement is his, nor does he assert that the signature was forged.[3] As such, defendant met its burden by merely attaching the Arbitration Agreement to its motion. (Cal. Rules of Court, rule 3.1330 [petition to compel arbitration may either quote provisions of arbitration agreement verbatim or attach a copy of the agreement to the petition].)

The Class Action Waiver

Defendant next challenges the court's finding that the Arbitration Agreement's class action waiver violates sections 7 and 8 of the NLRA. In this portion of the holding, the court relied on *Morris v. Ernst & Young, LLP* (9th Cir. 2016) 834 F.3d

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[3] Recent cases discussing what an employer must do to overcome an employee's challenges to his or her alleged *electronic* signature on an arbitration agreement under Civil Code section 1633.9 (see, e.g., *Espejo v. Southern California Permanente Medical Group* (2016) 246 Cal.App.4th 1047, 1060; *Ruiz v. Moss Bros. Auto Group, Inc.*, *supra*, 232 Cal.App.4th at pp. 845-846) are distinguishable because the concerns regarding the potential inauthenticity of an electronic or digital signature are not present in the case of a "wet ink" signature.

975, *Lewis v. Epic Systems Corp.* (7th Cir. 2016) 823 F.3d 1147, and several other authorities. While this appeal was pending, those authorities were abrogated by *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612, 1632, in which the United States Supreme Court upheld the enforceability of class action waivers in arbitration agreements. Under *Epic* and *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, the Arbitration Agreement's class action waiver is enforceable, and is no longer a barrier to its enforcement.

Unconscionability

We now turn to whether the Arbitration Agreement was unconscionable. We review the court's ruling on unconscionability de novo to the extent it is based on a pure question of law. However, to the extent the court's determination of unconscionability is based upon its resolution of conflicts in the evidence or on the factual inferences that may be drawn therefrom, we consider the evidence in the light most favorable to the court's determination and review those aspects of the determination for substantial evidence. (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 236-237; *Rebolledo v. Tilly's, Inc.* (2014) 228 Cal.App.4th 900, 912.)

Both California law and federal law favor the enforcement of valid arbitration agreements. (*Armendariz, supra*, 24 Cal.4th at pp. 96-97.) But courts will not enforce an arbitration agreement that is unconscionable. (*Id.* at p. 99.) Unconscionability "refers to '"an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."' [Citation.] As that formulation implicitly recognizes, the doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results."'" (*Baltazar v. Forever 21, Inc*. (2016) 62 Cal.4th 1237, 1243 (*Baltazar*).)

Both procedural and substantive unconscionability must be present before an arbitration provision is rendered unenforceable on unconscionability grounds, but "'they need not be present in the same degree.'" (*Baltazar, supra*, 62 Cal.4th at p. 1243.) Courts invoke a sliding scale in which "'the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" (*Id*. at p. 1244.) "'The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement.'" (*Id.* at p. 1245.)

Procedural Unconscionability

"The procedural element [of unconscionability] addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 246 (*Pinnacle*).) Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice, whereas surprise arises when terms of the bargain are hidden in a verbose, pre-printed form drafted by the party in the superior bargaining position. (*Carbajal, supra*, 245 Cal.App.4th at p. 243.)

In finding the Arbitration Agreement here to be procedurally unconscionable, the court concluded it was an adhesion contract and plaintiff had no chance to meaningfully negotiate its terms. There is conflicting evidence in the record as to whether the Arbitration Agreement was freely negotiated by the parties,[4] but we

[4] "Adhesive contracts are those where a party of superior bargaining strength drafts the contract and imposes its terms in a take-it or leave-it manner." (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 713.) On the one hand, defendant's chief compliance officer and Associate General Counsel states in his declaration that "[e]mployees are not

conclude the court's conclusion that the Arbitration Agreement was an "adhesion contract" is supported by substantial evidence — namely, plaintiff's declaration.

The court also found that the agreement was procedurally unconscionable because it referenced the Rules and Procedures document that was not provided to or made easily available to plaintiff. We agree. As noted above, section 8 of the Arbitration Agreement provides that "[t]he Arbitrator shall be selected as provide[d] in [defendant's] Rules and Procedures," but defendant's Rules and Procedures were not attached to the Arbitration Agreement nor given to plaintiff when he was asked to sign the Arbitration Agreement. Further, the Arbitration Agreement does not provide any instructions on how or where plaintiff could obtain a copy of the Rules and Procedures if he so desired.[5] In effect, plaintiff was asked to blindly sign the Arbitration Agreement without knowing what the standalone rules said or how those terms would affect his rights. The attempted incorporation by reference of the Rules and Procedures' provision on arbitrator selection

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required to sign the arbitration agreement to gain employment" and that "on occasion, an employee will refuse it" (though it is unclear from his declaration that he had personal knowledge in this regard). On the other hand, the Arbitration Agreement was drafted by defendant, which presumably had superior bargaining power over plaintiff. Further, plaintiff claims he "was only instructed that [he] was *required* to fill out and sign the stack of documents and forms presented to [him] *before* [he] could start work," and that he did not reach a final agreement with defendant about his compensation until "*after* [he] finished filling out each of the documents and forms," suggesting that the agreement was given to him on a take-it-or-leave-it basis. (Italics added.)

[5] Unlike section 2 of the Arbitration Agreement, which references JAMS' Employment Arbitration Rules and Procedures and indicates that a copy of the JAMS rules "may be obtained at anytime from [defendant's] Legal Department," section 8 contains no instructions on where to obtain defendant's Rules and Procedures. Further, there is no indication in the record that defendant's Rules and Procedures were publicly available on the Internet or otherwise easily accessible for review. (Compare *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 691 ["There could be no surprise, as the arbitration rules referenced in the agreement were easily accessible to the parties — the AAA rules are available on the Internet"].)

was thus tantamount to a hidden term. This increases the Arbitration Agreement's level of procedural unconscionability because, as we hold below, the hidden term was substantively unconscionable. (*Baltazar, supra*, 62 Cal.4th at p. 1246 [employer's failure to provide arbitration rules is procedurally unconscionable only if rules are substantively unconscionable].)

Substantive Unconscionability

This brings us to the question of substantive unconscionability. Substantive unconscionability exists when a term is so one-sided as to shock the conscience. (*Pinnacle, supra,* 55 Cal.4th at p. 246.) "'Substantive unconscionability "may take various forms," but typically is found in the employment context when the arbitration agreement is "one-sided" in favor of the employer without sufficient justification.'" (*Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 177.)

In evaluating substantive unconscionability, courts often look to whether the arbitration agreement meets certain minimum levels of fairness. In *Armendariz,* our Supreme Court instructed that, at a minimum, a mandatory employment arbitration agreement must (1) provide for neutral arbitrators, (2) provide for more than minimal discovery, (3) require a written award that permits limited judicial review, (4) provide for all of the types of relief that would otherwise be available in court, and (5) require the employer to pay the arbitrator's fees and all costs unique to arbitration. (*Armendariz, supra,* 24 Cal.4th at p. 102.) "Elimination of or interference with any of these basic provisions makes an arbitration agreement substantively unconscionable." (*Wherry v. Award, Inc.* (2011) 192 Cal.App.4th 1242, 1248.)

With the exception of the arbitrator selection provision, which we discuss below, defendant's Arbitration Agreement comports with *Armendariz*'s minimum requirements. It provides that the parties are "entitled to conduct discovery to the full

extent authorized by the California Code of Civil Procedure"; it requires the arbitrator to issue "a written decision explaining his or her findings and conclusions"; it requires that the arbitrator "apply the substantive state or federal law (and the law of remedies, if applicable) as applicable to the claim(s) asserted"; and it requires defendant to pay for the arbitrator's fees and expenses.

On the subject of arbitrator selection, section 8 of the Arbitration Agreement states that "[t]he Arbitrator shall be selected as provide[d] in [defendant's] Rules and Procedures." Because the Rules and Procedures were not provided to plaintiff, we closely scrutinize the arbitrator selection clause appearing therein. (*Baltazar, supra*, 62 Cal.4th at p. 1246 ["courts will more closely scrutinize the substantive unconscionability of terms that were 'artfully hidden' by the simple expedient of incorporating them by reference rather than including them in or attaching them to the arbitration agreement"].)

Before turning to substantive unconscionability, however, we must first address the threshold issue of whether the Rules and Procedures were actually incorporated by reference into the Arbitration Agreement. We hold they were not. """""It is, of course, the law that the parties may incorporate by reference into their contract the terms of some other document. [Citations.] But each case must turn on its facts. [Citation.] For the terms of another document to be incorporated into the document executed by the parties *the reference must be clear and unequivocal*, the reference must be called to the attention of the other party and he must consent thereto, and *the terms of the incorporated document must be known or easily available to the contracting parties*."""""" (*Avery v. Integrated Healthcare Holdings, Inc*. (2013) 218 Cal.App.4th 50, 66, italics added [applying these principles in the context of an arbitration agreement].) Here, the Rules and Procedures were not given to plaintiff during his employment nor otherwise made available for his review, so it cannot be said

they were incorporated into the Arbitration Agreement. Even if the Rules and Procedures had been easily available for plaintiff's review at the time of contracting, the *only* section of the Rules and Procedures expressly referenced in the Arbitration Agreement is the arbitration selection provision (section II). The other five paragraphs of the Rules and Procedures are never mentioned in the Arbitration Agreement, and thus were not incorporated by reference.

Assuming arguendo that the arbitrator selection provision in the Rules and Procedures had been incorporated by reference, we would agree with the trial court that it is substantively unconscionable because it allows defendant "to control the pool of potential arbitrators every time," thereby creating a risk of the "repeat player" effect. The Rules and Procedures' arbitrator selection provision (Section II) provides: "[Defendant] shall propose three JAMS arbitrators to the Employee to arbitrate all claims between the Parties. If the Parties cannot agree on a JAMS arbitrator, then the Employee shall propose three JAMS arbitrators to [defendant]. If the Parties still cannot agree on a JAMS arbitrator, then [defendant] shall propose two JAMS arbitrators and the employee shall select one to arbitrate the claims." The likely consequences of this language require little stretch of the imagination: defendant will propose three arbitrators that it likes; the employee will reject all three names and propose three arbitrators that he likes; defendant will in turn reject all three arbitrators proposed by the employee; and defendant can then force the employee to pick between defendant's two favorite arbitrators. There is nothing to prevent defendant from always rejecting the three names proposed by the employee, thereby ensuring that defendant always has complete and unilateral control over the pool of potential arbitrators. Although the employee makes the final choice on an arbitrator, the choice comes from a list exclusively created by defendant. This creates a risk that defendant would have an advantage as a "repeat player" before JAMS and that the selected arbitrator would not be a true neutral as required by *Armendariz*. (*Mercuro v.*

Superior Court (2002) 96 Cal.App.4th 167, 178 ["The fact an employer repeatedly appears before the same group of arbitrators conveys distinct advantages over the individual employee. These advantages include knowledge of the arbitrators' temperaments, procedural preferences, styles and the like and the arbitrators' cultivation of further business by taking a 'split the difference' approach to damages."]; *Chavarria v. Ralphs Grocery Co.* (9th Cir. 2013) 733 F.3d 916, 923 [arbitrator selection provision that always produced an arbitrator proposed by defendant in employee-initiated arbitration proceeding was unconscionable].)

The court also found that the Rules and Procedures' provision on attorney fees is unconscionable because it is inconsistent with the Labor Code. We agree that this provision would be substantively unconscionable if it had been incorporated by reference into the Arbitration Agreement.[6] As noted above, however, it was not. The Arbitration Agreement does not expressly reference this provision or purport to incorporate it by reference. Indeed, the Arbitration Agreement has its own provision on attorney fees (section 13), which, unlike the fees provision in the Rules and Procedures, is consistent with California law. Section 13 of the Arbitration Agreement provides that "if any party

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[6] As the trial court correctly noted, the Rules and Procedures' provision on attorney fees (section V) improperly allows defendant to seek recovery of its attorney fees if it is the prevailing party at arbitration. Fee-shifting in favor of a defendant-employer runs contrary to Labor Code sections 1194, subdivision (a) and 1194.3, which provide for *one-way* fee shifting in favor of a wage and hour plaintiff. Simply put, an employee who prevails is entitled to recover his or her reasonable attorneys' fees, but an employer that prevails does not have a corresponding right to recover its attorney fees. (*Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1253.) The Rules and Procedures' provision on attorney fees is thus inappropriate because it would give defendant greater remedies than it would have in court and because it could potentially deter employees from pursuing valid claims in arbitration. (See *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 860 [rationale behind *Armendariz*'s requirements "is to ensure that the cost of arbitration does not deter a plaintiff from bringing a claim"].)

prevails on a statutory claim which affords the prevailing party attorneys' fees and costs, or if there is a written agreement providing for attorneys' fees and costs, the Arbitrator may award reasonable attorney's fees and costs to the prevailing party."[7] Section 10 further provides that "[t]he Arbitrator shall apply the substantive state or federal law (and the law of remedies, if applicable) as applicable to the claims(s) asserted." Read together, these two sections require an arbitrator presiding over a wage and hour arbitration to apply the one-way fee shifting rules set forth in Labor Code sections 1194, subdivision (a) and 1194.3, if applicable. We therefore find no substantive unconscionability in the Arbitration Agreement's attorney fees provision.

The court also concluded, without much explanation, that the Arbitration Agreement's provision on arbitration fees and costs is substantively unconscionable because it is "burdensome and unclear." We disagree. Section 13 of the Arbitration Agreement properly provides that defendant "shall be responsible for the arbitrator's fees and expenses." (Although not incorporated by reference into the Arbitration Agreement, section IV of the Rules and Procedures similarly provides that defendant "shall be responsible for the arbitrator's fees and expenses which exceed the costs that the Employee would have incurred in State and/or Federal Court.") Both provisions comply with *Armendariz* in that they do "not require employees to pay . . . any arbitrators' fees or expenses as a condition of access to the arbitration forum." (*Armendariz*, *supra*, 24 Cal.4th at p. 102.)

Lastly, the court concluded the agreement was substantively unconscionable because "PAGA claims (recently filed), whether individual or

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[7] We are not persuaded by plaintiff's argument that the Rules and Procedures constitute such a "written agreement," given that plaintiff neither signed nor was given a copy of the Rules and Procedures.

representative, arguably cannot be ordered to arbitration pursuant to a pre-dispute waiver or arbitration agreement, with no agreement by the State of California."[8]

Although its minute order is not entirely clear, the court appears to have taken issue with section 4 of the Arbitration Agreement, which provides that an employee's *individual* PAGA claims will be arbitrated and that an employee's *representative* PAGA claims will be stayed pending the arbitration. It is true that recent cases have held that PAGA claims cannot be split into individual and representative components that are litigated in separate forums. (See, e.g., *Hernandez v. Ross Stores, Inc.* (2016) 7 Cal.App.5th 171, 178 ["[t]here is no authority . . . that an employer may legally compel an employee to arbitrate the individual aspects of his PAGA claim while maintaining the representative claim in court"]; *Perez v. U-Haul Co. of California* (2016) 3 Cal.App.5th 408, 422.) However, the enforceability of an agreement purporting to split PAGA claims into individual and representative components is evaluated under a public policy analysis, not an unconscionability analysis. (*Perez*, at p. 422.) Indeed, "the unenforceability of the waiver of a PAGA representative action does not make [it] substantively unconscionable." (*Poublon v. C.H. Robinson Co.* (9th Cir. 2017) 846 F.3d 1251, 1264; see *Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109, 1123 [the determinations of "whether an agreement has been validly formed, and whether its terms are adhesive or unconscionable — are different from the determination

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[8] The operative first amended complaint did not include any claims under the Private Attorneys General Act (Lab. Code, § 2698 et seq.; PAGA), but it appears plaintiff filed a separate PAGA case in early 2017. The appellate record does not contain any information regarding the separate PAGA case, except that the court ordered the matter transferred to the judge handling the present matter. As far as the present record discloses, the separate PAGA case is proceeding on a separate track in the trial court. Thus, the issue of the arbitrability of the future PAGA claims is not before us. Further, as we explain, the Arbitration Agreement's attempt to split the individual and representative components of PAGA claims into separate forums is not a proper consideration when evaluating whether the Arbitration Agreement is unconscionable.

of whether [the employee] entered into a knowing and intelligent waiver of her right to bring a PAGA claim . . . or whether *Iskanian*[*v. CLS Transportation Los Angeles, LLC, supra,* 59 Cal.4th 348] compels a conclusion that such a waiver is unenforceable as against public policy"].) Thus, even if section 4 of the Arbitration Agreement improperly splits PAGA claims into individual and representative components and is thus unenforceable as against public policy (an issue we need not decide here), that would not contribute to the Arbitration Agreement's level of substantive unconscionability as the trial court seems to have assumed.

To recap, we hold that substantial evidence supports the trial court's conclusion that the Arbitration Agreement is an adhesion contract, and that the Arbitration Agreement's attempted incorporation by reference of the Rules and Procedures' provision on arbitrator selection is procedurally unconscionable because the Rules and Procedures were not given to or otherwise accessible by plaintiff. We further hold that the Rules and Procedures' provision on arbitrator selection, to the extent it is incorporated by reference into the Arbitration Agreement, is substantively unconscionable, but that the remainder of the Arbitration Agreement (including the provisions on attorney fees and arbitrator fees) passes muster under *Armendariz*. To that end, we disagree with the court's rulings that the Arbitration Agreement's attorney fees provision and arbitration fees provision are substantively unconscionable, and we disagree with the court's apparent assumption that the Arbitration Agreement's attempt to split individual and representative PAGA claims contributes to the agreement's substantive unconscionability.

Severability

We now turn to the question of severability. Civil Code section 1670.5, subdivision (a) gives trial courts discretion to sever unconscionable provisions from a

contract: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (*Ibid*.) Although the statute gives "a trial court some discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement," it "appears to contemplate the latter course only when an agreement is 'permeated' by unconscionability." (*Armendariz, supra,* 24 Cal.4th at p. 122.)

Here, the court declined to sever the substantively unconscionable terms, reasoning that "the agreement is permeated with those one-sided, overly harsh and unfair provisions." We review that ruling for abuse of discretion. (*Armendariz, supra*, 24 Cal.4th at p. 124; *Nguyen v. Applied Medical Resources Corp*. (2016) 4 Cal.App.5th 232, 255.)

In discussing severability, our Supreme Court has explained that "[i]f the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced." (*Armendariz, supra,* 24 Cal.4th at p. 124; see *Wherry v. Award, Inc., supra,* 192 Cal.App.4th at p. 1250 [declining to sever offending clauses because agreement was "rife with unconscionability"].) On the other hand, "[i]f the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Armendariz, supra,* 24 Cal.4th at p. 124; see *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1075 [severing the single unconscionable provision]; *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 709-710 [when agreement "not otherwise permeated by unconscionability, the offending provision, which is plainly collateral to the main purpose of the contract, is properly

severed and the remainder of the contract enforced"]; *Serafin v. Balco Properties Ltd., LLC, supra*, 235 Cal.App.4th at pp. 183-184 ["a court should sever an unconscionable provision unless the agreement is so 'permeated' by unconscionability that it cannot be cured by severance"]; Civ. Code, § 1599 ["Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest"].) "The overarching inquiry is whether '"the interests of justice . . . would be furthered"' by severance." (*Armendariz, supra,* 24 Cal.4th at p. 124.)

Two policies support severing an illegal term rather than voiding the contract altogether: "The first is to prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement — particularly when there has been full or partial performance of the contract. [Citations.] Second, more generally, the doctrine of severance attempts to conserve a contractual relationship if to do so would not be condoning an illegal scheme." (*Armendariz, supra,* 24 Cal.4th at pp. 123-124.) *Armendariz* extended the body of law regarding the severability of illegal terms of a contract to the severability of unconscionable terms. (*Id*. at p. 124 ["The basic principles of severability that emerge from Civil Code section 1599 and the case law of illegal contracts appear fully applicable to the doctrine of unconscionability"].)

In *Armendariz,* the Supreme Court found that two factors weighed against severance of the offending terms: (1) the arbitration agreement contained *multiple* unlawful provisions; and (2) there was no single provision that the court could strike or restrict to remove the unconscionable taint. (*Armendariz, supra*, 24 Cal.4th at pp. 124-125.) Here, by comparison, the court could have saved the Arbitration Agreement by striking the following 12-word *single* sentence (section 8) from the Arbitration Agreement: "The Arbitrator shall be selected as provide[d] in [defendant's] Rules and Procedures." In other words, there is a "single provision [we] can strike or restrict in

order to remove the unconscionable taint from the agreement." (*Armendariz, supra,* 24 Cal.4th at pp. 124-125.)

Unlike cases in which severance was found to be inappropriate, the Arbitration Agreement at issue here was not "permeated" by unconscionability and would not have to be "reformed" in order to eliminate unconscionability. Striking the single reference to the Rules and Procedures would leave the parties with an Arbitration Agreement that otherwise passes muster under *Armendariz*, and it would "prevent [the] parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement" (*Armendariz, supra,* 24 Cal.4th at p. 123) while "conserv[ing] a contractual relationship" (*id*. at p. 124). The "main purpose" of the Arbitration Agreement is presumably "to provide a mechanism to resolve disputes." (*Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 92 [severing a single provision on costs of arbitration].) Because the arbitrator selection provision (section 8) "is collateral to that purpose, severance was available." (*Ibid*.) Further, striking the arbitrator selection provision would not leave a gaping ambiguity in the Arbitration Agreement on the subject of arbitrator selection because the parties would presumably apply rule 15 ("Arbitrator Selection, Disclosures and Replacement") of the JAMS Employment Arbitration Rules & Procedures; such rules are validly incorporated by reference into the Arbitration Agreement in section 2. In view of the law which clearly favors the enforcement of arbitration agreements, and observing there is no evidence in the record that the insertion of the arbitrator selection procedures was done in bad faith, and, finally, considering the ease with which the Arbitration Agreement here can be made entirely conscionable and otherwise valid under the *Armendariz* requirements, we conclude the trial court abused its discretion in refusing to sever section 8 of the Arbitration Agreement. (*Farrar v. Direct Commerce, Inc.* (2017) 9 Cal.App.5th 1257,

1275 [finding trial court abused its discretion in refusing to sever single unconscionable provision from arbitration agreement].)[9]

We express no opinion as to the potential application of Code of Civil Procedure section 1281.2, subdivision (d), which provides in part: "If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies." We hold *only* that, after severing section 8 of the Arbitration Agreement, it is *not* substantively unconscionable and is enforceable as to plaintiff's non-PAGA claims. Other issues bearing on whether plaintiff should be ordered to arbitration, including, without limitation, the treatment of future PAGA claims and the potential application of section 1281.2, subdivision (d), are left to the sound discretion of the trial court on remand.

DISPOSITION

The order denying defendant's motion to compel arbitration is reversed and the trial court is directed to sever section 8 of the Arbitration Agreement. To be clear, defendant's Rules and Procedures are not part of the Arbitration Agreement. While the Arbitration Agreement may be procedurally unconscionable, after severance it is not

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[9] Severance is also consistent with section 15 of the Arbitration Agreement, which states that "[i]f any provision of this Agreement to arbitrate is adjudged to be void or otherwise unenforceable, in whole or in part, the void or unenforceable provision shall be severed and such adjudication shall not affect the validity of the remainder of this Agreement to arbitrate."

substantively unconscionable and is, without more, enforceable as to plaintiff's individual non-PAGA claims. The resolution of any other issues bearing on whether arbitration should be compelled is left to the sound discretion of the trial court.

In the interests of justice, each party shall bear its or his own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

GOETHALS, J.